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“EVOLVING PARADIGMS OF GENDER JUSTICE: A JOURNEY TOWARDS EQUALITY IN INDIA”

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Abstract

Gender justice is about ensuring fairness and equality for individuals of all genders, which has evolved significantly over time. Initially, society recognized only two genders: Male and Female. However, as our understanding has grown, the acknowledgment of other identities such as Transgender, Gender Fluid, and Bigender has emerged, which we collectively refer to as Open Gender.

Historically, gender discrimination reached alarming heights, especially between men and women. To combat this injustice, the United Nations and various international conventions have taken significant steps to promote gender equality and secure rights for women in society. As a developing nation, India stands at a crucial juncture where the promotion of gender justice is not just beneficial, but essential for rapid progress. It is the State's responsibility to enact laws and policies that ensure gender equality for all citizens. The context of gender rights can be viewed through two significant phases: before and after Independence. During colonial rule, the British prioritized their interests over gender equality, leaving little room for advancement. However, post-independence, Indian legislators prioritized creating laws aimed at improving women's status and securing their rights, marking a pivotal shift towards gender equality.

Entering the 21st century, India is witnessing rapid growth, aligning itself with global standards of gender equality. States play a critical role in implementing various laws, treaties, and policies designed to uphold gender justice. To achieve a fair and equitable society, we must continue to advocate for and ensure the rights of all genders, recognizing that our collective progress depends on equality for everyone.

In this paper, the researchers will evaluate the responsibility of the state for providing gender justice. The researchers will also explain the needs of the present society and also how people misuse the powers provided by the state for ensuring gender justice. The researchers also critically evaluate how state machinery fail to make laws gender neutral and protect the rights of Open Gender.

Introduction

Gender inequality was one of the biggest issues which were faced by the world for so long. After so many years of struggle, we are finally at the stage where the state can minimize societal gender inequality. The main agency that can help to overcome gender inequality is the state or the government of the respected country. In the world, two types of nations are there, one is a developed nation and, the other is a developing nation. India is currently a developing nation. India is a democratic nation so all the responsibility automatically lies on the government to secure the rights of its citizens and provide equal protection to everyone by ensuring gender equality.

This research paper will analyze the concept of gender justice by describing the meaning of gender and how the idea of gender has changed in the modern era compared to the traditional one. In this paper, the researchers will describe the need for gender equality to deliver gender justice in contemporary times. Apart from this, the researchers will explain the meaning of gender equality and how the state can help to provide gender justice by enacting laws, making policies, and signing various international conventions and treaties as how the state has failed to enact gender-neutral statutes and what is the need of gender-neutral laws. In the end, the researchers also try to elaborate on the situations of other genders and what is the responsibility of the state toward them.

The world is changing rapidly, and with that, the understanding of gender is evolving. Traditionally, there were only two recognized genders: male and female. However, today we acknowledge the existence of various other genders that must be included in our understanding of gender. Historically, laws and policies were primarily focused on women and children because they were the ones most affected by inequality. While the status of women and children has improved significantly in many areas, the laws have not kept pace with these changes. Most current legislation remains gender-centric or women-centric, which can overlook the broader concept of gender equality.

In this paper, the researchers aim to encourage law-making agencies to shift their focus toward creating gender-neutral laws that encompass the full spectrum of gender identities, including those in the Open Gender community.

Gender Justice

Gender justice is not just a term; it is a process aimed at ensuring equality for all citizens through the actions of the state and its judicial system. To fully grasp the concept of gender justice, we first need to explore what "gender" means in a broader context. After this, we can examine how the state can effectively deliver gender justice to all individuals.

Gender is defined under section 2(10) of Bhartiya Nyaya Sanhita, 2023 which states that “The pronoun “he” and its derivatives are used of any person, whether male or female”¹. According to UNICEF “The concept of gender includes the expectations held about the characteristics, aptitudes and likely behaviors of both women and men (femininity and masculinity).”²

By understanding the definition of gender, we recognize that it traditionally includes only male and female identities, excluding other genders that exist in the world. However, as society evolves, it is crucial to ensure gender justice and promote gender equality. To achieve this, the state must create laws that apply equally to all genders and make special provisions for the open gender community to uplift their status in society.

After understanding the meaning of gender, further we have to understand the meaning of gender equality. “Gender equality means that the rights, responsibilities and opportunities of individuals will not depend on whether they are male or female, handicapped or able bodied, young or elderly, white or black, or from rural or urban settings”³ and according to UNICEF gender equality means "The concept that women and men, girls and boys have equal conditions, treatment and opportunities for realizing their full potential, human rights and dignity, and for contributing to (and benefitting from) economic, social, cultural and political development. Equality does not mean that women and men will become the same but that women’s and men’s rights, responsibilities and opportunities will not depend on whether they

¹ S. 2(10), Bhartiya Nyaya Sanhita, 2023.

² See Gender equality: GLOSSARY OF TERMS AND CONCEPT, UNICEF, available at <https://www.unicef.org/rosa/media/1761/file/Genderglossarytermsandconcepts.pdf>, last seen on 20/07/2024.

³ See <https://esaro.unfpa.org/en/topics/gender-equality#:~:text=Gender%20equality%20means%20that%20the,in%20dignity%2C%20safety%20and%20security>.

are born male or female.”⁴

The definition of gender equality typically refers to the equality between male and female genders, but it does not address equality concerning the Open Gender community. In today's society, a pressing question is whether women require special privileges to achieve gender equality.

Gender justice is not just a term; it is a process aimed at uplifting underprivileged genders so they can live freely and without discrimination. The responsibility for delivering gender justice lies with the state or government of each country. In India, as a democratic republic, the parliament enacts laws to ensure gender equality among its citizens.

Historically, our society has been male-dominated, and during that time, women faced significant suffering due to inequality, racism, and discrimination. They did not have the opportunity to improve their status for various reasons. After gaining independence, the parliament enacted several laws designed to elevate the status of women and children. These laws were necessary at that time; however, even after nearly 75 years, they continue to exist, which can sometimes overshadow women's status in society. Consequently, some men feel it is unreasonable that the focus remains heavily on women's rights today, while the needs of the Open Gender community are often overlooked.

Laws showing gender biasness

The primary function of the law is to maintain peace and harmony in society by providing rights and outlining duties for all citizens, applicable equally to everyone. However, an analysis of various laws in India reveals that many of them are gender-biased, often discriminating against men while neglecting the needs of the open gender community.

Several laws in India, such as the Indian Penal Code (IPC), the Bharatiya Nyaya Sanhita, the Domestic Violence Act, the Maternity Benefit Act, and the Prevention of Sexual Harassment (POSH) Act, primarily focus on women's rights, often giving them an advantage over other genders. In this discussion, we will explore some of these laws and their provisions, which are not gender-neutral.

⁴ See Supra 2.

- **Bhartiya Nyaya Sanhita**

The newly introduced Bhartiya Nyaya Sanhita (BNS) seems to have left the police in a dilemma by excluding the provisions previously covered under IPC Section 377, which addressed sodomy and unnatural sex. The officials are not sure which sections of BNS to invoke in case of sexual misconduct against a man, transgender or an animal.

Offences against women and children were scattered throughout in Indian Penal Code, of 1860. They have been consolidated under Chapter- V of the Bhartiya Nyaya Sanhita, 2023. Offences against women and children have been given precedence over other offences. The law is silent about the offences committed against the person belonging to Open Gender.

- **Domestic Violence Act, 2005**

This Domestic Violence Act, 2005 is enforced to ensure that a female victim of domestic violence can receive a four-fold support system, which would include residence orders, custody orders, protection orders, and a defendant's money supply. In *Meenavathi vs. Senthamarai Selvi (2008)*, it was held that a complaint under this Act cannot be filed against a woman, and women cannot be asked to be removed from the household of the victim, which goes to show that this Act is made for the protection of women.

The Act assumes that it is only women who can be victims. Moreover, the Act also assumes that there are only two genders, like most women-centric laws in India. As per [Section 32\(2\)](#) of the Act, it is stated that the statement of the woman who is the victim will be considered as true without any need for supporting evidence. This increases the possibility of misuse of this Act. In case of *Dr. N.G Dastane v. S. Dastane*⁵, SC held that although physically cruelty is presumed to be done mainly by husband being the powerful but the mental cruelty can be done by both husband and wife. Even wife can do mental cruelty on husband.

- **Maternity Benefit Amendment Act, 2017**

This act has been implemented with the idea of safeguarding new mothers and avoiding any kind of backlash that they may face because of becoming a mother. The amendment made to this Act in 2017 was a progressive one and can be viewed as a step towards creating a more equal and safer workspace for women, doing away with the age-old patriarchal beliefs.

One of the major disadvantages or fallacies in this Act is the assumption that gender is binary, meaning that there exist only two genders, either men or women. There is no provision for

⁵ Dr. N.G Dastane v. S. Dastane, AIR 1975 SC 1534.

those who do not fit into these two genders and are having a child. Moreover, even for two genders, this Act is not gender-neutral. There is no mention of paternity leave, implying that the duty of taking care of a child is that of a mother, solely.

- **Sexual Harassment at Workplace (Prevention, Prohibition and Redressal) – POSH Act, 2013**

The need for such legislation was observed for the first time by the Hon'ble Supreme Court in *Vishaka v State of Rajasthan*⁶. It was in this case that the Court issued [guidelines](#) that were to be followed at all workplaces since there was an absence of any law providing measures to keep a check on the issues of sexual harassment at the workplace. This was a landmark case for the protection of women against sexual harassment at the workplace.

Unfortunately, men who face sexual harassment at the workplace cannot seek help from authorities by way of this Act since it only provides cover for female workers. A major criticism for this Act is that it is not gender-neutral as it doesn't just ignore men as victims, but fails to create a safe space for those who belongs to the Open Gender community.

- **Mukhyamantri Ladli Behna Yojana**

The Mukhyamantri Ladli Behna Yojana, while aimed at empowering women, has faced criticism regarding its implications for the male community. Critics argue that initiatives focused solely on women can inadvertently lead to feelings of exclusion among men, particularly in families where both genders contribute to household income. But this yojana have certain negative impact on other genders like Men may feel marginalized or overlooked, especially if they consider themselves the primary earners. This perception can foster resentment and a sense of injustice if resources are directed exclusively towards women. In households where males are also in need of support, the focus on women's financial assistance may not adequately address the family's overall economic challenges, potentially limiting the effectiveness of the program. Advocates for gender equity suggest that while programs like the Ladli Behna Yojana are important, there should also be initiatives that support men, fostering a balanced approach to gender justice that acknowledges the needs of all individuals.

⁶ Vishaka v. State of Rajasthan, AIR 1977 SC 3011

Gender Justice for all

The researchers began by defining gender equality and identifying the needs of the people. They then discussed the existing laws, which are meant to be gender-neutral but exhibit gender bias. Next, we explore state responsibility in creating a gender-neutral society where individuals are treated equally, regardless of caste, race, sex, religion, or place of birth.

An analysis of the Universal Declaration of Human Rights (UDHR) reveals that it employs the term "everyone" in every article, emphasizing its gender neutrality. This demonstrates that the UDHR is applicable to all human beings, including males, females, and individuals of non-binary gender identities.

Laws must adapt to reflect the changing nature of society. However, in the Indian legal system, many laws have remained unchanged for 50 or 60 years. Legislators need to recognize that societal culture is evolving and that laws must evolve accordingly to avoid infringing on people's rights.

The Vishakha guidelines established by the judiciary, which later evolved into the POSH Act enacted by the legislature, were significant in protecting women's rights and clarifying the responsibilities of corporations, ultimately promoting gender justice. However, the situation has changed in the modern world. Men also experience harassment in the workplace by their superiors, yet they often lack rights to address such actions. Additionally, individuals belonging to the open gender community face various forms of harassment that are often unimaginable.

Shonee Kapoor, Legal Consultant - Specialising in POSH, says, "I have met and discussed sexual harassment with male victims. However, due to no laws to support their issues, it has been an uphill task with such male victims being sexually harassed by male offenders/culprits. And, the situation is grave when it comes to males being harassed by females, especially when they had been in a relationship, as there is a danger of being framed in a false rape case."⁷

The Act is silent on male or LGBTQ+ employees who may be subjected to workplace sexual harassment. Section 2(a)[3] defines an aggrieved woman as one who claims to have been subjected to an act of sexual harassment. Section 3[4] specifies that no woman shall be subjected to sexual harassment in the workplace. Thus, by limiting the scope to women, the

⁷ <https://hr.economicstimes.indiatimes.com/news/workplace-4-0/is-it-high-time-the-posh-act-should-address-mens-concerns-too/108189260>,

Act precludes the opportunity to resolve sexual harassment complaints raised by men or other individuals.

We recommend that legislators must have to enact gender-neutral laws that are available for all genders in our society whether male, female, or open gender. It is the primary duty of the criminal law that it must be gender neutral as said by the hon'ble Supreme Court in the case of *Joseph Shine v. Union of India*⁸ that “Prima facie, on a perusal of [Section 497](#) of the Indian Penal Code, we find that it grants relief to the wife by treating her as a victim. It is also worth noting that when an offense is committed by both of them, one is liable for the criminal offense but the other is absolved. It seems to be based on a societal presumption. Ordinarily, the criminal law proceeds on gender neutrality but in this provision, as we perceive, the said concept is absent. That apart, it is to be seen when there is conferment of any affirmative right on women, can it go to the extent of treating them as the victim, in all circumstances, to the peril of the husband.”

IPC or BNS there are several crimes that are gender biased they are mainly available to females gender only and give them extra right which means legislators feel that the particular crime cannot be committed against other gender. Offences mentioned under IPC like Assault or criminal force to women with intent to outrage her modesty (Sec 354), Sexual Harassment (Sec 354A), Assault or use of criminal force to women with intent to disrobe (Sec 354B), Voyeurism (Sec 354C), Stalking (Sec 354D), Sextortion (Sec 354E), all section relating to Rape (Sec 376 to 376D), Adultery (Sec 497), Cruelty (Sec 498) are purely gender biased.

Under IPC only one section (Sec 377) was there which talked about unnatural offenses that include all genders but the Supreme Court declared that section 377 as unconstitutional in the case of *Navtej Singh Johar v. Union of India*⁹ in the year 2018.

Conclusion

India is a deeply religious country where people's perspectives are often limited by their religious rituals and beliefs. These frameworks can restrict any activities deemed unnecessary or unethical, which in turn affects their spiritual thoughts. Historically, this is reflected in the *Manusmriti*, which categorizes society into four primary classes: Brahmins (the priestly class), Kshatriyas (warriors and rulers), Vaishyas (merchants), and Shudras (laborers). Notably,

⁸ *Joseph Shine v Union of India*, AIR 2018 SC 4898.

⁹ *Navtej Singh Johar v. Union of India*, AIR 2018 SC 4321.

Manusmriti does not address women's status, leading followers to place women in the lowest tier, effectively ranking them fifth in this hierarchy.

While this social structure persisted for many years, society has gradually evolved, and the status of women has improved significantly over time. Lord Macaulay, when drafting the Indian Penal Code, operated within this same categorical framework. However, with the implementation of the BNS Act in 2023, the circumstances have changed, highlighting the need for gender-neutral legal provisions that apply equally to everyone. Unfortunately, the BNS law appears biased toward women and does not provide remedies for crimes committed against transgender individuals or men in specific situations.

Additionally, other laws, such as the Prevention of Sexual Harassment (POSH) Act and the Domestic Violence Act, focus primarily on the rights of women and the responsibilities of men. There is a gap in legislation concerning the rights of men and the duties of women, as well as the rights and responsibilities of individuals who identify as non-binary or belong to the open gender category.

In today's world, many developed countries, such as the United States, the United Kingdom, and Canada, are making significant strides in providing equal rights to all genders through gender-neutral laws. These nations serve as examples of how effective legislation can foster inclusivity and support for the open gender community.

These countries are providing equal rights to all genders through the implementation of gender-neutral laws. These countries recognize the importance of creating a legal framework that does not discriminate based on gender identity, thereby ensuring that all individuals—regardless of whether they identify as male, female, transgender, non-binary, or any other gender—are afforded the same rights and protections under the law. For instance, legislations that address issues like marriage rights, healthcare access, anti-discrimination policies, and employment opportunities have been revised to accommodate and affirm diverse gender identities. This progressive approach not only fosters inclusivity but also promotes social acceptance and visibility for marginalized communities. Furthermore, these nations actively engage in public awareness campaigns and education initiatives to dismantle societal stereotypes and prejudices, strengthening the overall support for gender equality. By setting a benchmark for gender justice, they serve as an inspiring model for other countries looking to enhance their legal

systems and promote an equal society where all individuals can thrive without fear of discrimination or bias.

As we continue to advance discussions around feminism, it is vital to expand our focus to encompass all genders, including women. By recognizing and valuing the rights of everyone equally, we can work together to update our laws, making them more gender-neutral. This progress will help us create a more just and equitable society for all individuals, paving the way for true gender justice.

